DAILY RECORD

Published every day (Mondays excepted),
BY HOLLAND & CO.

OFFICE—WEST END OF LACOUR STREET.

TERMS:

One year, by Mail or Express.....$12
Six Months.....6
Three Months.....3
[None forwarded till paid for.]

THE DAILY RECORD
Is delivered in Pioche, Bullionville and Hamilton, at Fifty Cents per week, payable to the Carriers.

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PIOCHE DAILY RECORD.

VOL. VII. PIOCHE, NEVADA, SUNDAY, DECEMBER 14, 1873. NO. 76.

THE RAYMOND & ELY VS. THE KENTUCKY MINING COMPANY.

Judge Beatty's Decision.

[Continued from our issue of the 13th.]

The repeal of that article could not divest that right, though no doubt it did completely abrogate the rule which it had attempted to establish as to what should be deemed evidence of abandonment. That rule was probably inoperative from the beginning as being in conflict with the general law of the land. But its repeal before it could have had any operation, in any event, does away with the necessity of determining what effect it might have had. Suppose, however, none of the Panaca locators had ever done any work on their claims after they were recorded, their right to the ground could not have been forfeited prior to April 18, 1865, and by the amendments to the mining laws of July 15, 1864, it became impossible for their claims ever to be forfeited until the miners of the district, or the Legislature of the State, or Congress, chose to revive that penalty. This was never done till after the active resumption of work by the successors of the Panaca locators. Upon these various and independent grounds I have my conclusion that the right to these locations was never forfeited. It was contended in the argument that these amendments of July 15, 1864, should be disregarded as unreasonable and of injurious effect. But I am satisfied that the courts of this State can no more disregard the the plain intent of a mining regulation upon such considerations, than they can set aside a statute passed by the Legislature. The Legislature is the exclusive judge of questions of policy, and as to the internal regulations of mining districts, the miners are the Legislature. Their local customs and regulations have long been recognized by the courts as the rule of decision of mining rights, and their authority to make such regulations and establish such customs has been expressly ratified by the Legislature and Congress (Act of Congress, July 25, 1866, Ch. 153, Sec. 1). All that a court can do is to inquire whether or not their rules are in conflict with the law established by the sovereign power. If there is no conflict the rule is binding. If it is an unpolitic rule, the miners must be left to make that discovery for themselves and to amend it, or if it is a matter of general interest, the Legislature will amend it. There is no doubt that, until the passage by Congress of the mining law of May, 1872, the miners had, and always exercised, the right of prescribing the conditions of forfeiture of mining claims. No doubt they often abused that right, and that was probably the reason why Congress at last interfered. While, however, they had the right to prescribe the conditions of forfeiture, they could certainly provide that there should be no forfeiture in any event.

Were their claims abandoned.

The result of the authorities cited upon this point seems to be *non user* or failure to occupy a mining claim during the period which, under the statute of limitations, would bar any action for its recovery, raises a presumption of abandonment, but not a conclusive presumption. It may be rebutted by proof of circumstances which show that there was no intention to abandon. The law of Congress of May 5, 1866, Ch. 42, Sec. 2, does not change this rule in its application to this case. Its only effect was to preserve the mining claims included in the territory transfered from Utah to Nevada, in *statu quo*, unaffected by the change of jurisdiction, to make them as good in Nevada as they were in Utah. It left them, as all property every where is, subject to be abandoned, and it left the rule for determining the fact of abandonment unchanged. Applying that rule to this case, it is shown that all of the Panaca locators failed to occupy or work their claims during a longer period than that prescribed by our statute of limitations (two years) prior to the Kentucky location. The presumption is that they all were abandoned, and there is no evidence sufficient to rebut this presumption except in the cases of Hamblin, Sherwood and Vandermark. My conclusion is that these three parties did not abandon their claims, but that all the others did.

The plaintiff as successor in interest to Hamblin, Pulsifer, Sherwood and Vandermark has a perfect right to as much of the Raymond & Ely vein as was embraced in their original locations—a right which dates back to March 17, 1864.

But those locations embraced but three hundred and fifty out of the thousand feet in controversey, and do not include any portion of the ground from which the plaintiff was ousted by the defendant. This renders it necessary to determine the next questions. Was the Kentucky location valid, and if so, were the rights originally acquired under it preserved?

If the location was valid there is no doubt that the right acquired by means of it were preserved by a full compliance with every requirement of the mining law. But two objections are urged against the validity of the lacation.

First. That the notice was void for uncertainty, because it did not in any way designate what particular thousand feet of the ledge was claimed.

Second. That the claim was void on account of the fraud attempted by the locators in claiming two hundred feet for discovery, on a vein which they knew to have been previously discovered and located by others; under whose license they were mining upon it at the very time of their locations.

As to the first objection, I do not think that the intention of the locators, Lee and Baker, that the monument should mark the center of the claim, cures the defect of the notice. If their secret intention could control the location, no one could ever have been safe in going within a thousand feet of them on either side, for another trial, in a controversey between other parties, McCall might say that it was his intention that the claim should extend a thousand feet to the east of the monument; or Ayre might say that his intention was that it should run wholly to the west. Of course I wish it to be understood, that I say this only by way of illustration of the endless uncertainty and confusion that would result from a rule allowing locators of mining ground to establish their boundaries by means of their unpublished intentions, and not for the purpose of intimating that McCall or Ayr would swear to anything but the truth. The very essence of a mining location is the manifest intention to appropriate a certain specific portion of the mineral lands not in excess of the amount allowed to the locator. All of the objects of requiring any sort of location to be made would be deferred if a locator should be allowed to float his claim to any portion of a vein to which he might be willing to swear it was his intention it should apply But although the actual intention of the locators cannot be allowed to mend their notice, it may be that, by legal construction, such notices will always be held to extend the claim equal distances each way from the location monument. The case is not quite parallel to those cases decided in the State of Kentucky, which are cited in support of this view; but, conceding that it falls within the principle established by these decisions, and that there is no objection to the validity of the location on the ground of uncertainty, the second objection appears to me to be fully sustained.

The Act of Congress of July 26, 1866, was in force at the date of the Kentucky location. It provides (sec. 4) "that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode."

Now, on the assumption that the Kentucky and the Panaca are on the same vein, it is clear that Lee was not the first discoverer, and, moreover, he knew it when he made his location, for he says that he considered at the time that the Panaca shaft had been sunk on a detached portion of the croppings of the vein he located.

But on any assumption it is shown by the overwhelming weight of evidence that, at the date of the Kentucky location, Lee and Baker both knew of the previous location of the same ground by Atchinson, Chanbard and others as the Caroline. Assuming, as we must, that they knew the law, Lee and Baker attempted a deliberate fraud upon the public by taking a discovery claim in addition to all they were entitled to. In my opinion this invalidated the whole location. For McCall and Ayr must participate in the consequences with Lee and Baker, who acted for them, and for the further reason that they had notice at the time that they were locating the Caroline claim. Having such notice they could only take a discovery claim at their peril. It has been suggested that although these four men had not the capacity to take more than eight hundred feet of the vein, their attempt to take a thousand feet does not render their claim utterly void as to the excess; in other words, that it left them a good claim to eight hundred feet extending equal distances each way from the monument.

This might have been so if they had been acting in good faith, really believing that they were the discoverers of the vein. But they were acting in bad faith and their fraudulent intent tainted the whole itransaction. They cannot now be permitted to reap all the advantage they would have gained by acting honestly. Attempting to compass by fraud more than they were entitled to they incur the penalty of losing what they might have had.

The Kentucky location then being void the ground was free to be appropriated by the locators of the Lightner claim, except that part of it covered by the Hamblin and Pulsifer claims.

WAS THE LIGHTNER LOCATION VALID?

The objection to it is that it was not made in good faith by the locators for themselves, but was made for the benefit of the corporation, plaintiff.

There is no doubt about the fact. The location was made for the benefit of the corporation. But does that invalidate it? The argument is that a corporation is a single person, and that even if it could make a location of mining ground it could take only two hundred feet, whereas the Lightner locations was of a thousand feet. All this is very true, but the conclusions do not follow. The corporation acquired this ground not by location but by conveyance from the locators. They had a right to locate it, and to do afterwards what they pleased with their claims.

The plaintiff was in possession of the ground, claiming it under a title of doubtful validity. It had expended large sums in prospecting for the vein. It had been successful. There was nothing wrong in its attempt to strengthen its title. The corporation was one, but its stockholders were numerous. A thousand feet of ground was not an excessive amount for them to claim if they had done so directly. Was there any harm in their doing it through others who were willing and could be trusted to make the location and convey to the corporation? I think not. The result was that the stockholders acquired interests in the ground in exact proportion to their contributions for its development. In its substance and essence this was a fair and honorable transaction; in its form it was without a flaw. The locators took no more than they had a right to take, and neither the defendant nor the public is concerned to inquire upon what considerations they conveyed it to the plaintiff.

I conclude therefore that the right of the plaintiff was complete, at the date of the commencement of this action, to all that part of the Raymond & Ely vein covered by the Lightner location, and also to those portions embraced in the old Panaca locations of Hamblin, Pulsifer, Sherwood and Vandermark; that is to say, to all the ground sued for, and all the ground claimed by the defendant in its answer, except about one hundred and thirty feet on the west end of the Kentucky claim.

The plaintiff is therefore entitled to have judgment of restitution of the ground described in the complaint, with $500.00 damages on account of ore extracted and removed by the defendant, and for its costs of suit. Also to a decree perpetually enjoining the defendant, as prayed for.

It is ordered that judgment, and decree be entered accordingly.

W. H. BEATTY, District Judge.
Hamilton, Dec. 1, 1873.

The foregoing conclusions have been reached upon the assumption made for the purpose of the argument that the Kentucky location was on the Raymond & Ely vein. It was essential to the defendant's case that this fact should be established, and the burden of proving it was on the defendant. In the attempt to do so, I think the defendant wholly failed, and for this reason alone plaintiff is entitled to a judgment as prayed for in its complaint, so that if I have been wholly mistaken in all my other conclusions, the same result follows.

I had reserved this point for a separate discussion, intending to review the testimony and state my reasons at large for the conclusions I have come to. But I find the subject too extensive, and the necessity of mailing this opinion to-day compels me to forego what I had intended. If there should be a motion for a new trial, I will take that occasion to express my views fully upon this branch of the case. W. H. BEATTY, District Judge.

Hamilton, Dec. 1, 1873.

State of Nevada, County of Lincoln —ss.

I, P. B. Miller, County Clerk, and Ex-Officio Clerk of the Seventh Judicial District Court, in and for said County of Lincoln and State of Nevada, do hereby certify that the foregoing is a full, true and correct copy of the original decision now on file in my office.

Witness my hand and the seal of said Court aforesaid, this 13th day of December, A. D. 1873.

[L. S.] P. B. MILLER, Clerk.

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Following is a list of sales of delinquent stocks now advertised in our paper:

PIOCHE.

Assessment	No. 5
Levied	October 30
Amount per share	$1
Delinquent in office	Dec. 10
Day of sale	Jan. 2, 1874
Secretary	Chas. E. Elliot
Office	Room 28 Hayward's Building, San Francisco.

BOWERY.

Assessment	No. 4
Levied	Nov. 5
Amount per share	50 cts
Delinquent in office	Dec. 15
Day of sale	Jan. 9
Secretary	Chas. E. Elliot
Office	Room 28, Hayward's Building, San Francisco.

INGOMAR.

Assessment	No. 6
Levied	Nov. 6
Amount per share	25 cts
Delinquent in office	Dec. 16
Day of sale	Jan. 9
Secretary	Chas. S. Neal
Office	Room 29 Hayward's Building, San Francisco.

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JNO. B. SHAW, Secretary.

KEYSTONE R. A., CHAPTER NO. 6, U. D. Called convocations first and third Thursday evenings in each month at 7 o'clock. Stated convocations second and fourth Thursday evenings in each month.
Sojourning brethren and companions in good standing cordially invited to attend.
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H. KRAUSE, Secretary. je28-tf

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